Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO.

In The
Supreme Court Of The United States

LILLIAN HUCKABY ROACH,

Petitioner,

v.

JAMES EVERETT ROACH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

Petition for Writ of Certiorari

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54?

QUESTION PRESENTED FOR REVIEW

I. Whether the Georgia Court of Appeals' refusal to consider the merits of the Petitioner's appeal because unnecessary portions of the record were not designated for the appeal deprived the Petitioner of her property interest in state law causes of action without due process of law in violation of U.S. Const. amend. XIV.

LIST OF PARTIES TO PROCEEDINGS BELOW

Pursuant to Sup. Ct. R. 14(b), the Petitioner submits the following list of parties to the proceedings before the Court of Appeals of Georgia.

The Petitioner is Lillian Huckaby Roach, who was the plaintiff in the Superior Court of Cobb County, Georgia, the appellant in the Court of Appeals of Georgia, and the petitioner in proceedings for discretionary review in the Supreme Court of Georgia.

The Respondent is James Everett Roach, who was the defendant in the Superior Court of Cobb County, Georgia, the appellee in the Court of Appeals of Georgia, and the respondent in proceedings for discretionary review in the Supreme Court of Georgia.

There are no parent companies or nonwholly owned subsidiaries involved in this case.

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OPINIONS BELOW

The Superior Court of Cobb County, Georgia, issued two separate opinions and orders in *Lillian Huckaby Roach v. James Everett Roach,* Civil File Action No. 94-12637-04, which are not reported and are set forth in the appendix beginning at A-8 and A-12.

The opinion and order of the Court of Appeals of Georgia in *Lillian Huckaby Roach v. James Everett Roach,* Appeals Case No. A-98-A-1687, is not reported and is set forth in the Appendix beginning at A-1. The Court of Appeals order denying the Petitioner's motion for reconsideration is not reported and is set forth in the Appendix at A-4.

The order of the Supreme Court of Georgia denying the Petitioner's petition for certiorari is not reported and is set forth in the Appendix at A-5. The order of the Supreme Court of Georgia denying the Petitioner's motion for reconsideration is not reported and is set forth in the Appendix at A-6. The order of the Supreme Court of Georgia denying the Petitioner's second motion for reconsideration is not reported and is set forth in the Appendix at A-7.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals of Georgia was entered on March 2, 1999 (A-1). The Petitioner timely filed a motion for reconsideration with the Court of Appeals of Georgia on March 26, 1999, which was denied by an order entered March 30, 1999 (A-4). On April 19, 1999, the Petitioner's petition for certiorari was docketed in the Supreme Court of Georgia, and on July 2, 1999 the Supreme Court of Georgia issued an order denying the petition (A-5). On July 16, 1999, the Petitioner filed a motion for reconsideration with the Supreme Court of Georgia, which was denied by an order

entered July 30, 1999 (A-6). The Petitioner submitted a second motion for reconsideration with the Supreme Court of Georgia, which was denied in an order entered September 14, 1999 (A-7). The Petitioner filed a notice of intention to apply for certiorari with the Court of Appeals of Georgia on September 29, 1999.

This Court has jurisdiction to review the orders and judgment of the Court of Appeals of Georgia under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1 provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ga. Code Ann. § 5-6-33(a) (1995) provides as follows:

> Either party in any civil case and the defendant in any criminal proceeding in the superior, state, or city courts may appeal from any sentence, judgment, decision, or decree of the court, or of the judge thereof in any matter heard at chambers.

Ga. Code Ann. § 5-6-37 (1995) provides as follows:

> Unless otherwise provided by law, an appeal may be taken to the Supreme Court or the Court of Appeals by filing with the clerk of the court wherein the case was determined a notice of appeal. The notice shall set forth the title and docket number of the case; the name of the appellant and the name and address of his attorney; a concise statement of the judgment, ruling, or order entitling the appellant to take an appeal; the court appealed to; a designation of those portions of the record to be omitted from the record on appeal; a concise statement as to why the appellate court appealed to has jurisdiction rather than the other appellate court; and, if the appeal is from a judgment of conviction in a criminal case, a brief statement of the offense and the punishment prescribed. The appeal shall not be dismissed nor denied consideration because of failure to include the jurisdictional statement or because of a designation of the wrong appellate court. In addition, the notice shall state whether or not any transcript of evidence and proceedings is to be transmitted as a part of the record on appeal. Approval by the court is not required as a condition to filing the notice. All parties to proceedings in the lower court shall be parties on appeal and shall be served with a copy of the notice of appeal in the manner prescribed by Code Section 5-6-32.

STATEMENT OF THE CASE

Lillian Huckaby Roach, the Petitioner herein, filed the instant action in April 1994 against James Everett Roach, the Respondent. The complaint set forth claims against the Respondent arising out of events during the last illness and death on April 4, 1994 of James Austin Roach, who was the Petitioner's husband and who was the Respondent's father. The Petitioner's claims requested a declaratory judgment regarding the property of James Roach and equitable distribution of marital assets (Count I) and sought recovery against the Respondent for tortious interference with the marital relationship and contract (Count II), slander (Count III), fraud (Count IV), conversion (Count V), diversion of property (Count VI), equitable relief (Count VII), punitive damages (Count VIII), and attorney's fees and costs (Count IX).

On May 17, 1995, the Superior Court of Cobb County, Georgia, entered an order granting the Respondent's motion for summary judgment as to Count II of Petitioner's complaint, ruling that a claim for interference with the marital relationship was no longer allowed in Georgia (A-10). On January 14, 1998, the superior court entered an order granting the Respondent's motion for summary judgment as to Counts III, IV, V, and VI, and granting sua sponte summary judgment as to the remaining counts in Petitioner's complaint (A-17, 18). The superior court wrote that it agreed with the Respondent's argument that the majority of claims were ones the Petitioner did or could have asserted in an action in the Probate Court of Gwinnett County, Georgia, involving James Roach's estate and were barred by claim preclusion, the relevant statute of limitations, or the lack of evidence (A-16).

The Petitioner appealed this judgment to the Court of Appeals of Georgia. In connection therewith, the Petitioner filed a notice of appeal as required by Ga. Code Ann. § 5-6-37

(1995), which was thereafter amended on April 2, 1998. The amended notice set forth 19 separate documents to be included in the record on appeal. In her brief before the Court of Appeals, the Petitioner set forth five enumerations of error, including that the superior court erred in relying upon erroneous facts and in applying an incorrect legal standard governing the statute of limitations, res judicata, and slander, and in resolving questions of fact on the slander claim, and in failing to make determinations required by statute in connection with granting summary judgment. Respondent did not challenge the sufficiency of the record in his response to the Petitioner's brief.

The Court of Appeals of Georgia affirmed the judgment, writing in its opinion that "[t]he notice of appeal filed by [plaintiff] is not in the form directed by OCGA § 5-6-37 in that, rather than designating portions of the record to be omitted on appeal, [plaintiff has] instructed that only items listed on the notice of appeal be included in the record sent to this court" (A-1, 2). The Court of Appeals determined that some portion of the evidence relied upon by the superior court had been omitted from the record. Because a court looks to the entire record on consideration of a motion for summary judgment,

> appellants who omit portions of the record which they view as not pertaining to any issue on appeal create a probably fatal defect in their appeals. Such omissions from the appellate record from matters on summary judgment generally prove fatal to appellate review since it must be assumed by a reviewing court that the trial court's grant of summary judgment is properly supported by the trial court record and since appellant has the burden of showing error affirmatively by the record on appeal.

(A-2.) The Court of Appeals refused to review the Petitioner's claims on their merits because the trial court granted summary judgment based upon the "entire record," and the entire record had not been designated in the Petitioner's amended notice of appeal (A-3).

The Petitioner moved in the Court of Appeals for reconsideration of this decision, arguing that the facts which need to be considered on appeal are only those which bear upon the enumerations of error made by the appellant. The amended notice of appeal set forth all the documents required to show error in the superior court's decision. For example, the superior court dismissed the Petitioner's slander claim on the basis of the statute of limitations, but erroneously relied upon a July 11, 1993 date as the outside date for accrual of the cause of action (A-12). The Petitioner's amended complaint, which was included among the documents designated in the amended notice of appeal, alleged that the Respondent slandered the Petitioner "on or after June 4, 1993." Similarly, the superior court ruled that res judicata barred some of the Petitioner's claims, an issue of law which could be determined on the basis of the probate court order. That order also was a document designated in the amended notice of appeal. The Court of Appeals denied the motion for reconsideration (A-4).

The Petitioner then sought review of the order of the Court of Appeals of Georgia by filing a petition for writ of certiorari with the Supreme Court of Georgia. The Petitioner again argued that all documents required to review the errors enumerated as to the superior court's decision were designated in the amended notice of appeal. The Supreme Court of Georgia denied the petition for certiorari (A-5). Petitioner filed a motion for reconsideration, which also was denied, with two members of the Supreme Court of Georgia dissenting (A-6). The Petitioner filed a second motion for reconsideration in which she argued that the Court of Appeals' action denied her

"substantial rights assured by statute and by the federal and state constitutions" (A-22). The second motion for reconsideration argued that the Court of Appeals could not apply a procedural rule to deny the Petitioner constitutional rights (A-23) and specifically argued that application of the procedural rule to deprive her of her statutory right to review violated her right to due process under U.S. Const. amend XIV (A-23). The Supreme Court of Georgia also denied the second motion for reconsideration (A-7).

ARGUMENT

The decision of the Court of Appeals of Georgia shows that that court simply refused to consider the Petitioner's substantive claims on appeal. The Court of Appeals bypassed consideration of the merits of the Petitioner's appeals because of a supposed failure to designate all matters presented to the trial court as a part of the record on appeal. However, the Court of Appeals at no point identified any specific item necessary to determine the enumerations of error which was omitted from the list of items designated in the Petitioner's amended notice of appeal. Instead, the Court of Appeals based its refusal to consider the Petitioner's enumerations of error upon a strict application of a rule of procedure requiring all matters to be designated on the record on appeal where the appeal is from a disposition on summary judgment (A-2, 3).

The Court of Appeals' refusal to consider the Petitioner's claims is nearly identical to the refusal of a hearing which this Court held violated due process in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). In *Logan*, a state court ruled that an employee was not entitled to pursue a claim that he had been the victim of discrimination in violation of state law because the state commission charged with enforcement of the state law did not hold a factfinding conference within the statutorily prescribed time limit. The

state court ruled that a timely factfinding conference was a jurisdictional prerequisite to recovery on a discrimination claim and that the employee was barred from obtaining any determination of the validity of his claim.

This Court reversed, holding that the application of the procedural rule to prevent the employee from being heard on his discrimination claim violated the Due Process Clause of U.S. Const. amend. XIV. The *Logan* decision initially held that the employee's claim under the state employment discrimination laws was a species of property protected from unfair deprivation by the Due Process Clause. "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Id.* at 429. This Court found the employee's discrimination claim to be no different from the right to make a claim against an estate, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), or other causes of action which have previously been found to be protected by the Due Process Clause because of their recognition under state law. *Logan*, 455 U.S. at 429-30.

The *Logan* decision went on to hold that the application of the state procedural rule to prevent the employee from obtaining a hearing on his discrimination claim was a violation of due process because it deprived him of an opportunity for a hearing on his claim. "As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Id.* at 433. While the timing and nature of the hearing required by due process depend upon the private interests involved, the finality of the deprivation, and the governmental interests at stake, those interests could not justify depriving the employee of any hearing on his claim:

> Logan's interests in retaining his employment, in disproving his employer's charges of incompetence or inability, and—more intangibly—in redressing an instance of alleged discrimination, are all substantial. At the same time, the deprivation here is final; Logan, unlike a claimant whose charge is dismissed on the merits for lack of evidence, cannot obtain judicial review of the Commission action. A system or procedure that deprives persons of their claims in a random manner . . . necessarily presents an unjustifiably high risk that meritorious claims will be terminated. And the State's interest in refusing Logan's procedural request is, on this record, insubstantial.

Id. at 434-35. This Court held that the employee was entitled to *some* hearing on the merits of his claim, and the state's refusal to consider the merits of the claim because of the operation of the procedural rule was inconsistent with and violative of the Due Process Clause of the Fourteenth Amendment. *Id.* at 437.

The instant Petitioner's case is no different from that considered in *Logan*. The Petitioner is seeking redress for claims recognized under state law and so has a property interest in those claims protected by the Due Process Clause. More to the point, Ga. Code Ann. § 5-6-33(a) (1995) grants an appeal as of right to "[e]ither party in any civil case . . . from any sentence, judgment, decision, or decree of the [superior] court." Thus, Georgia law entitled the Petitioner to seek redress for errors in the superior court by appeal to the Court of Appeals. As in *Logan*, this right to seek redress is a property interest protected by the Due Process Clause.

Cases which hold that due process does not require a right to appeal do not require a different conclusion. In this case, the Petitioner does have a right to appeal under state law. "[T]he right to appeal, having been established by the law of [a state], may not be abrogated or otherwise administered in a way which denies an appellant of the constitutional right to due process or equal protection." *Able v. Bacarisse*, 131 F.3d 1141, 1143 (5th Cir. 1998). Even though it was not obligated to provide for appeals, having granted litigants an appeal as of right the State of Georgia may not deprive the Petitioner of that right in a way which is inconsistent with due process.

The decision in *Logan* also establishes that the Petitioner was deprived of her right to an appeal without due process. Just as the employee in *Logan* was not given the opportunity to have his discrimination claim considered on its merits, the Petitioner also was not afforded consideration of her appeal on the merits. The Court of Appeals of Georgia's decision shows that it dismissed the Petitioner's claims because the Petitioner did not designate all documents as part of the record on appeal, not because the errors enumerated by the Petitioner did not have merit (A-2, 3). The Court of Appeals based its affirmance of the superior court solely upon a procedural rule, the same situation considered by this Court in *Logan*. This disposition of the Petitioner's claims without consideration of their merits is wholly inconsistent with the fundamental principle that "the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Logan*, 455 U.S. at 434 (footnote omitted).

This case is not one where the opportunity to be heard was denied because of the application of a "reasonable" procedural rule. *Logan* and other cases recognize that a state may impose procedural requirements, such as statutes of limitations and filing fees, as conditions upon a litigant's access

to the courts. But the crucial point stressed by this Court is that the procedural requirement must be "reasonable." *Id.* at 437. As stated in *Jones v. Union Guano Co.*, 264 U.S. 171, 181 (1924), "[t]he Fourteenth Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real, and the condition imposed has reasonable relation to a legitimate object." A fortiori, a procedural rule which deprives a litigant of his right to have a state-created claim considered on its merits and which is unreasonable and which has no rational relationship to a legitimate goal violates the Due Process Clause.

In the instant case, the Court of Appeals of Georgia's application of the rule requiring all documents be made a part of the record on appeal is wholly unreasonable and without any rational basis. It applied this rule without any consideration of the errors actually enumerated by the Petitioner, the documents designated in the amended notice of appeal, or the judgment of the superior court. Had it done so, the Court of Appeals would have discovered that *all* documents necessary for the determination of the issues raised by the Petitioner on appeal were designated for inclusion in the record or that the enumerated errors was apparent on the face of the superior court's judgment. For example, the Petitioner asserted that the superior court's judgment and order failed to comply with state law requiring a recital of the bases for summary judgment, an error which was apparent on the face of the superior court's order and was not dependent upon the other documents of record. The Petitioner also included in the record documents showing that her claim of slander against the Respondent could not have been barred by res judicata because it arose after the prior judgment in the probate court, which was the basis for the application of res judicata by the superior court.

Thus, there was no legitimate basis for the Court of Appeals to apply the rule regarding the designation of the record. As in *Logan*, 455 U.S. at 434-35, there was no substantial interest in applying the rule and refusing to consider the merits of the Petitioner's appeal because the merits could have been determined on the basis of the matters designated in the amended notice of appeal. The Petitioner had a substantial interest in having her appeal heard and her claims for damages against the Respondent reinstated. The effect of the Court of Appeals' decision was to finally deprive the Petitioner of any opportunity to obtain redress from the Respondent. The decisions of the Court of Appeals and the Supreme Court of Georgia, which effectively held that there was no violation of the Petitioner's federal constitutional rights, must not be allowed to stand because it would allow the Petitioner's claims on appeal to be rejected without affording her the basic right of an opportunity to be heard.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully prays that a writ of certiorari issue to the Supreme Court of Georgia to review the judgment in this case and that, after full briefing, the judgment be reversed and remanded to the state courts for a consideration of the Petitioner's appeal on its merits.

Respectfully submitted,

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Counsel for Petitioner
Lillian Huckaby Roach

NO.

In The
Supreme Court Of The United States

LILLIAN HUCKABY ROACH,

Petitioner,

v.

JAMES EVERETT ROACH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

Appendix

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FIRST DIVISION
McMURRAY, P.J.,
BLACKBURN and ELDRIDGE, JJ.

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 37, September 17, 1998)

March 2, 1999

In the Court of Appeals of Georgia

A98A1687. ROACH v. ROACH. Mc-091

McMURRAY, Presiding Judge.

Plaintiff Lillian Huckaby Roach filed this action for damages against her step-son, defendant James Everett Roach. The action arises from circumstances surrounding the final illness of James Austin Roach, the now deceased husband of plaintiff and father of defendant.

As amended, plaintiff's nine count complaint seeks declaratory judgment, equitable relief, punitive damages, and attorney fees, along with damages arising from claims predicated on theories of tortious interference, slander, fraud, conversion, and diversion of property. Defendant filed three separate motions for partial summary judgment and, in two separate orders, the trial court granted summary judgment in favor of defendant as to all issues. Plaintiff appeals. Held:

"'The notice of appeal filed by [plaintiff] is not in the form directed by OCGA § 5-6-37 in that, rather than designating portions of the record to be omitted on appeal, [plaintiff has] instructed that only items listed on the notice of

appeal be included in the record sent to this court. Under the statutory scheme, the notice of appeal provides information concerning omission of portions of the record before the lower court. Nonetheless, after study of the record sent up and communication with the clerk of the court below, it is apparent that under the directs contained in the notice of appeal, some portion of the evidence upon which the superior court relied in this case has been omitted from the record on appeal.

"'It is well established that the burden is on the party alleging error to show it by the record and that where the proof necessary for determination of the issues on appeal is omitted from the record, an appellate court must assume that the judgment below was correct and affirm. Brown v. Frachiseur, 247 Ga. 463 (277 SE2d 16); Jackson v. Dept. of Transp., 201 Ga. App. 863, 865 (412 SE2d 847); Transport Indem. Co. v. Hartford Ins. Co., 198 Ga. App. 265, 266 (401 SE2d 294); Riverbend Ford-Mercury v. Kirksey, 196 Ga. App. 307, 309 (1) (395 SE2d 898); Taylor v. Colwell Mtg. Corp., 187 Ga. App. 397 (370 SE2d 520).' Bennett v. Executive Benefits, 210 Ga. App. 429 (436 SE2d 544).

"'"On consideration of summary judgments we and the trial court must look at the entire record" Lawson v. Duke Oil Co., 155 Ga. App. 363, 364 (270 SE2d 898) (1980).' MacKinnon v. Hodge, 204 Ga. App. 539 (420 SE2d 341). Consequently, appellants who omit portions of the record which they view as not pertaining to any issue on appeal create a probably fatal defect in their appeals. 'Such omissions from the appellate record from matters on summary judgment generally prove fatal to appellate review since it must be assumed by a reviewing court that the trial court's grant of summary judgment is properly supported by the trial court record and since appellant has the burden of showing error affirmatively by the record on appeal. Transport Indem. Co. v. Hartford Inc. Co., 198 ga. App. 265, 266(, supra)' Dillman v.

Hahres, 201 Ga. App. 210, 211 (411 SE2d 43)." Peacock v. Campbell, 223 Ga. App. 620 (478 SE2d 409).

The appellate record designated by plaintiff contains only the evidence filed contemporaneously with the last one of three motions for partial summary judgment filed by defendant. The evidence filed in support of the two previous motions is not included in the appellate record. The superior court's order recites that it considered the "entire record." Since plaintiff has omitted some portion of the evidence upon which the superior court relied, we must affirm. Tahamtan v. Sawnee Electric Membership Corporation, 228 Ga. App. 485, 486 (491 SE2d 918); Ferros v. Georgia State Patrol, 211 Ga. App. 50, 51, (20 (438 SE2d 163).

Judgment affirmed. Blackburn and Eldridge, JJ., concur.

Court of Appeals
of the State of Georgia

ATLANTA, MARCH 30, 1999

The Court of Appeals hereby passes the following order:

Case No. A98A1687

LILLIAN HUCKABY ROACH V. JAMES EVERETT ROACH

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

MAR 30 1999

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s *Clerk.*

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: July 2, 1999

Gerard D. Hegstrom
3291 Church Street
Scottsdale, GA 30079

Case No. S99C1062

LILLIAN HUCKABY ROACH v. JAMES EVERETT ROACH

COURT OF APPEALS CASE NO. A98A1687

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk

SUPREME COURT OF GEORGIA

Case No. S99C1062 Atlanta, July 30, 1999

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

LILLIAN HUCKABY ROACH v. JAMES EVERETT ROACH

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunstein and Carley, JJ., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk.

SUPREME COURT OF GEORGIA
Case No. S99C1062

Atlanta September 14, 1999

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

LILLIAN HUCKABY ROACH
v. JAMES EVERETT ROACH

It is ordered that the Second Motion for Reconsideration, in this case, received on August 9, 1999, is not allowed filed.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Lynn M Stinchcomb, Chief Deputy Clerk

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

LILLIAN HUCKABY ROACH	)	
	)	
Plaintiff,	)	**Civil Action**
	)	
v.	)	**File No. 941263704**
	)	
JAMES EVERETT ROACH,	)	
	)	
Defendant.	)	
	)	
	)	

ORDER

The above and foregoing matter having come on regularly before this Court on its civil non-jury calendar of Monday, April 3, 1995, for the Defendant's Motion for Summary Judgment, and after hearing oral argument and reviewing the record, the Court finds as follows:

On or about April 18, 1994, Plaintiff, Lillian Huckaby Roach, filed her complaint in this Court. The complaint contains counts for Declaratory Judgment, Tortious Interference, Slander, Fraud, Conversion, Diversion of Property, Equitable Relief, Punitive Damages, and Attorney Fees. On or about November 4, 1994, Defendant filed his Motion for Partial Summary Judgment seeking to eliminate the count for tortious interference asserting that such a claim has been abolished legislatively and judicially.

The original count at issue in the complaint stated as follows:

> Plaintiff did on or about July 27, 1993, unlawfully abduct, restrain, or detain Austin Roach, did interfere in the marital relationship and cause Plaintiff to lose the affections of Austin Roach and by threat of force and/or by deception or fraud did prevent Plaintiff from providing or receiving the love and care of Austin Roach, her husband, in his final days.

Prior to the filing of the instant action, Defendant's attorney sent correspondence to Plaintiff's attorney stating that the Legislature abolished any right of action for alienation of affection. See correspondence of Peter L. Lublin dated March 30, 1994, attached as Exhibit C to Defendant's Motion. The statute upon which the Defendant relies is O.C.G.A. 51-1-7 which states as follows:

> Adultery, alienation of affections, or criminal conversation with a wife or husband shall not give a right of action to the person's spouse. Rights of action for adultery, alienation of affections, or criminal conversation are abolished.

Defendant also relies on the Court of Appeals decision of Arnac v. Wright, 163 Ga. App 33, 292 S.E.2d 442 (1982) which interpreted said statute. There the Court agreed with the Defendant that the cause of action brought by the Plaintiff alleging that the Defendant intentionally interfered with and maliciously procured the breach of the marriage contract was a disguise for allegations of tortious interference with the marital contract and was thus an attempt to circumvent the proscription of the statute by doing indirectly that which the statute forbade him from doing directly.

Plaintiff responded to Defendant's contentions by filing an amended complaint. The amended complaint contains allegations regarding a contract and states in relevant part as follows:

> Defendant did on or about July 27, 1993, unlawfully abduct, restrain, or detain James Austin Roach, did interfere in the martial [sic] relationship and the mutual agreements between James Austin Roach and the Plaintiff with regard to their use and distribution of joint and/or marital assets; such contract provided for direct payment to Plaintiff of the joint checking account and for payment through the estate of 50% of all martial assets individually owned by James Austin Roach.

The remaining allegations contained in the amended count concern alleged breaches of the referenced contract. Defendant contends that the changes simply restate the first complaint and even more explicitly show that Plaintiff seeks damages for interference in a marital relationship and contract. The Court agrees.

As stated in the Arnac decision, "[I]t is a basic law in Georgia that we do not judge pleadings by their nomenclature but by their content and function." Arnac, at 34-35. Considering the allegations contained in the remainder of the complaint and the contents of the amended Count II, it is clear that the function of the amended count is that of the original count for tortious interference. Therefore, this Court holds that Defendant is entitled to summary judgment as to Count II of Plaintiff's complaint because tortious interference with a marital relationship is no longer a cause of action within the state of Georgia.

The purpose of summary judgment is to eliminate the necessity of trial where, giving the non-movant the benefit of all reasonable doubts and all favorable inferences that may be drawn, nevertheless the movant is entitled to a judgment as a matter of law. Bowman v. Unites States Life Insurance Co., 167 Ga. App. 673, 307 S.E.2d 134 (1983). "To succeed on a motion for summary judgment, the movant must show that there is no genuine issue as to any material fact and that he or she in [sic] entitled to a judgment as a matter of law." Coquet County Hospital v. Health Star, Inc., 262 Ga. 285, 417 S.E.2d 147 (1992). This Court finds that the Defendant has shown that there is no genuine issue as to any material fact with respect to Count II of Plaintiff's complaint, that he is entitled to a judgment as a matter of law, and therefore that the Defendant's Motion for Partial Summary Judgment is granted, leaving for resolution the remaining counts of Plaintiff's complaint.

The Defendant is also seeking attorneys fees generated as a result of having to bring this action and has submitted an affidavit in support thereof. However, the Court is not going to grant attorneys fees for the bringing of the motion and therefore the Defendant's request for same is denied.

SO ORDERED, this 17th day of May, 1995.

James G. Bodiford

JAMES G. BODIFORD, JUDGE
Superior Court
Cobb Judicial Circuit

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

LILLIAN HUCKABY ROACH,	)
	)
Plaintiff,	) CIVIL FILE ACTION
	) NO. 94-12637-04
JAMES EVERETT ROACH,	)
	)
Defendant.	)

ORDER ON DEFENDANT'S MOTIONS
FOR SUMMARY JUDGMENT

PROCEDURAL HISTORY

Plaintiff Lillian Huckaby Roach (hereinafter referred to as Plaintiff) filed the above styled action on April 18, 1994 against Defendant James Everett Roach (hereinafter referred to as Defendant). Defendant filed a timely answer on May 17, 1994.

Plaintiff's complaint and subsequent amendments to the complaint contain the following counts: Count I requests a declaratory judgment regarding the property of the probate estate of James Austin Roach (the father of Defendant hereinafter referred to as Mr. Roach) and equitable distribution of marital assets. Count II sets forth a cause of action for tortious interference with the marital relationship and contract. Count III sets forth a cause of action for slander concerning alleged statements on or before July 11, 1993 by Defendant that Plaintiff had stolen Mr. Roach's money or abused Mr. Roach. Count IV sets forth a cause of action for fraud. Count V sets forth a cause of action for conversion of property. Count VI

sets forth a cause of action for diversion of property. Count VII requests equitable relief. Count VIII requests punitive damages. Count IX requests attorney fees and costs. Plaintiff's complaint prays that:

> (a) the properties of James Austin Roach be declared subject to equitable division;
>
> (b) all transfers and the Last Will and Testament of James Austin Roach be set aside;
>
> (c) Plaintiff be awarded money damages for tortious interference, slander, fraud, conversion, and diversion, and
>
> (d) Plaintiff be awarded punitive damages and attorney fees.

Plaintiff's Complaint and subsequent amendments demonstrate that Plaintiff seeks to alter the outcome and circumvent the rulings of the probate court in the estate action. Plaintiff attempts to redress her grievances concerning the disposition of Mr. Roach's property, to secure equitable division of marital assets requested in her divorce action against Mr. Roach, and to circumvent abolition of the tort for the interference with the marital relationship. Plaintiff brings the above-styled action in her individual capacity against Defendant personally. The Estate of James Austin Roach and Defendant as executor are not parties before the Court.

Defendant filed a motion for summary judgment as to Plaintiff's cause of action for interference with the marital relationship and contract on November 4, 1994. Defendant filed a motion for summary judgment as to Plaintiff's cause of action for conversion, diversion, and fraud on May 26, 1995. Defendant filed a motion for summary judgment as to

Plaintiff's cause of action for slander on July 26, 1995. The parties have presented extensive briefs, evidence, depositions, and arguments on all motions to the court. On May 17, 1995, the Court granted Defendant summary judgment as to Plaintiff's cause of action for interference with the marital relationship and contract.

CASE BACKGROUND

1. Plaintiff Lillian Huckaby Roach and the late Mr. Roach entered into a formal marriage on April 24, 1991.

2. On or about June 4, 1993, Mr. Roach entered into Arborwood Personal care Homes which is an assisted living facility. During Mr. Roach's residence at Arborwood, he was in a semi-public atmosphere and in communication with family members, health care providers, legal counsel, representatives of Gwinnett County Department of Family and Children Services; a bank employee, and Gwinnett County Police Officers. Mr. Roach resided there until his final hospitalization on March 17, 1994. No petition for guardianship for an incapacitated adult was filed in reference to Mr. Roach.

3. Plaintiff filed a verified petition for divorce against Mr. Roach in the Superior Court of Gwinnett County on August 11, 1993. At that time, a mutual domestic relations restraining order issued. In said petition, Plaintiff alleges that the parties began to live separately on or about January 1993. Mr. Roach filed an answer and counterclaim to the petition. Said action was pending at the time of Mr. Roach's death. The petition, answer, and restraining order are included in the record of this action.

4. Plaintiff had no communication with Mr. Roach from late July 1993 until sometime after September 21, 1993. Therefore, Plaintiff has no personal knowledge regarding Mr. Roach's actions concerning disposition of his financial assets or estate in event of death, the reasons for Mr. Roach's action, or Mr. Roach's mental capacity. Plaintiff has no personal knowledge of the alleged exercise of undue influence, fraudulent practices, misrepresentations, or trickery upon Mr. Roach contained within her complaint.

5. On September 21, 1993, Mr. Roach executed a Last Will and Testament, which effectively excluded Plaintiff as an heir of his estate.

6. Mr. Roach died on April 4, 1994 at the age of eighty-four years.

7. On April 24, 1994, Defendant filed a petition to probate in solemn form Mr. Roach's Last Will & Testament dated September 21, 1993 with the Probate Court of Gwinnett County, File No. 94-0406. Plaintiff filed an application for years support and was awarded $20,000.00. Plaintiff further challenged the validity of the September 21, 1993 will on the grounds of lack of testamentary capacity, undue influence, fraud, and breach of contract to make a will and offered a prior will for probate. After trial on January 23 and 24, 1995, the Probate Court of Gwinnett County entered an order dated February 9, 1995 granting Defendant's petition. The order specifically found that Mr. Roach possessed testamentary capacity on September 21, 1993 and no facts existed to support allegations of undue influence, fraudulent practices or mental incapacity. The Supreme Court of Georgia affirmed the decision. The probate court order, testimony during the probate

court trial, and Supreme Court affirmation are included in the record of this action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having considered the entire record and arguments of counsel, as well as the applicable authority, the Court hereby finds and rules as follows on Defendant's two remaining Motions for Summary Judgment:

There are no genuine issues as to any material fact and the Defendant, JAMES EVERETT ROACH, is entitled to a judgment on all of Plaintiff's remaining claims as a matter of law.

From the outset of this case Defendant has continually argued that a majority of Plaintiff's claims and prayers for relief are claims that Plaintiff either already asserted and lost in the probate action or should have asserted, as a matter of law, in the probate action of Mr. Roach's estate. In the alternative, the Defendant argues that for those claims that are not subject to claim preclusion (or res judicata) in the case sub judice, such claims are barred by the Statute of Limitations and/or there has been a lack of evidence put forth by the Plaintiff to make a prima facie case, especially as concerns proof of ascertainable damages to the Plaintiff. Thus, Defendant forthrightly contends that Plaintiff brought this action because she could not accept the decision of the Probate Court of Gwinnett County and the Georgia Supreme Court's affirmation of the Probate Court's decision in the estate action, and she is trying to alter the outcome and circumvent the rulings of the Probate Court of Gwinnett County and the Georgia Supreme Court, thereby causing the Defendant to incur unnecessary expenses

and trouble. This Court agrees with Defense counsel. WHEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED that:

1. Defendant's Motion for Summary Judgment as to Count I of Plaintiff's Complaint, Declaratory Judgment, is GRANTED;

2. Defendant's Motion for Summary Judgment as to Count III of Plaintiff's Complaint, Slander, is GRANTED;

3. Defendant's Motion for Summary Judgment as to Count IV of Plaintiff's Complaint, Fraud, is GRANTED;

4. Defendant's Motion for Summary Judgment as to Count V of Plaintiff's Complaint, Conversion, is GRANTED;

5. Defendant's Motion for Summary Judgment as to Count VI of Plaintiff's Complaint, Diversion, is GRANTED;

6. Defendant's Motion for Summary Judgment as to the Count VII of Plaintiff's Complaint, Equitable Relief, is GRANTED;

7. Defendant's Motion for Summary Judgment as to Count VIII of Plaintiff's Complaint, Punitive Damages, is GRANTED; and

8. Defendant's Motion for Summary Judgment as to Count IX of Plaintiff's Complaint, Attorneys Fees and Costs, is GRANTED.

SO ORDERED, this 14th day of JAN., 1998.

Ken O. Nix

Ken Nix, Judge
Superior Court of Cobb County

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

LILLIAN HUCKABY ROACH,	)	
	)	
Plaintiff/Petitioner,	)	
v	)	CASE NO: S-99-C-1062
	)	
JAMES EVERETT ROACH,	)	
	)	
Defendant/Respondent,	)	

SECOND MOTION FOR RECONSIDERATION

Pursuant to Georgia Supreme Court Rule 26(b), Petitioner/Plaintiff Lillian Huckaby Roach (hereinafter "Lillian") moves this Court to reconsider its Order of July 2, 1999, denying the Petition for Certiorari and to reconsider its Order of July 30, 1999, denying with Dissent, the First Motion to Reconsider. A copy of the Order of July 30, 1990, is attached hereto as Exhibit "A".

STATEMENT OF PROCEEDING
AND MATERIAL FACTS

On January 14, 1998, the trial Court entered a Final Judgment, granting to Respondent/Defendant James Everett Roach (hereinafter ("James") Summary Judgment as to all remaining causes of action (R #27). The trial court had pending before it two Motions for Partial Summary Judgment related to (1) Lillian's Count III (Slander), and (2) Lillian's Counts IV, V, and VI (Fraud, Conversion, and Diversion). The Final Judgment, attached hereto as Exhibit "B", granted Summary Judgment as to Counts, I, III, IV, V, VI, VII, VIII, and IX. James's first motion for Partial Summary Judgment on

Count II, tortious interference had been previously granted on May 17, 1995.

Lillian's Motion to Set Aside and for New Trial were denied on March 11, 1998.

Rather than challenge all issues (i.e. tortious interference) extending over three (3) years Lillian chose to limit her direct challenge in the appeal to the Court of Appeals to five enumerations of error. See Appellant's Brief to the Court of Appeals. Lillian designated for appeal a limited record intended to demonstrate the specific enumerations of error. See Notice of Appeal (R #1).

On March 2, 1999 the Court of Appeals denied Lillian's appeal and affirmed the trial court decision without discussion of the enumerations of error and without reference to the record that showed errors of fact and law. The decision is attached hereto as Exhibit "C". The Court of Appeals, relying on cases cited and on the trial court Judgment that said it considered the entire record, chose to exclude any consideration of a limited record regardless of the issues raised or the errors that may appear on the record.

The decision offers no guidance on when, if ever, a limited record is accepted when issues are narrowed by the enumeration of errors and the record provided shows errors of fact and law.

On March 30, 1999, the Georgia Court of Appeals denied Lillian's Motion for Reconsideration.

Lillian filed a Petition for Writ of Certiorari with the Supreme Court. It was denied per curium on July 2, 1999.

Lillian moved for Reconsideration. On July 30, 1999, Lillian's Motion was denied with two dissenting votes (Exhibit "A"). The full court has not yet seen the errors seen by the dissenters.

Lillian respectfully requests court permission for Reconsideration pursuant to Supreme Court Rule 26(2).

ISSUE FOR CONSIDERATION

If the record on appeal from the trial court grant of partial summary judgment is less than the entire record, is the Court of Appeals compelled to deny the appeal solely on the basis of the limited record, and without review or consideration of the record provided or errors that appear in that record?

SUMMARY OF THE ARGUMENT

When a limited record on appeal demonstrates clear error that would compel reversal of the trial court, the Court of Appeals is not at liberty to refuse to consider that record.

The standards of review compel the Court of Appeals to reverse a decision "based upon a stated fact to which there is no evidence" (cites omitted), Lamas v Baldwin, 140 Ga App 37, 39, 230 SE2nd 213 (1976). The Judgment must be reversed if it rests on "reasons which are erroneous or upon erroneous legal theory", Smith v Helms, 140 Ga App 267, 269, 231 SE2nd 778 (1976), Ayers v Yancey Brothers Company, 141 Ga App 358, 361, 233 SE2nd 471 (1977). See also Power v Mobley, 170 Ga App 167, 316 SE2nd 580 (1984).

And if, as here, there is an erroneous finding that "may have been instrumental in the courts reaching it's final conclusion the judgment must be reversed" (emphasis added)

(Cites omitted) Adamson v Trust Company Bank, 155 Ga App 646, 649, 271 SE2nd 899 (1980).

When, as here, the trial court incorrectly applies the law (i.e. statute of limitations, res judicata) it renders the decision clearly erroneous and "mandates the reversal of the judgment" Scott v Purser Truck Sales, 198 Ga App 611, 613, 402 SE2nd 354 (1991).

The refusal to even consider the record presented denies Lillian the benefit of appellate standards of review that have long been held to be the law of Georgia.

The procedural rule followed by the Court of Appeals denies Lillian substantial rights assured by statute and by the federal and state constitutions.

A limited record is permissible, O.C.G.A. §§ 5-6-37, 5-6-38, and 5-6-42. See 1983 Georgia Constitution Article VI, Section IX, Paragraph I which mandates that the courts provide "speedy, efficient, and inexpensive resolution of disputes". The use of enumerations of error, O.C.G.A. § 5-6-40, and a limited record targeted to those enumerations would respond to that mandate.

Lillian has a constitutional right to a trial by jury in a civil case, Constitution of the United States, Amendment 7, and Constitution of the State of Georgia, 1983, Article I, Section I, Paragraph XI. Judgment without a jury, including Summary Judgment, does not infringe upon that constitutional right to trial by jury if there are no issues of material fact in dispute, CM3, Ins. v Associated Realty Investors/Prado, 201 Ga App 428, 429, 411 SE2nd 320 (1991), Bledsoe v Central Georgia Production Credit Assoc., 180 Ga 598, 599, 349 SE2nd 821 (1986), and Barrett v. Independent Order of Foresters, 625 F2nd 73, 75 (5th Circuit 1980). See also a more complete recent

review in Bruno's Food v Taylor, 228 Ga App 439, 449, 491, SE2nd 881 (1997) (concurring opinion). There are issues of fact for a jury.

Certainly the Court of Appeals cannot be at liberty to apply a procedural rule to exclude a limited record and thereby deny Lillian's statutory and constitutional rights.

However, in each of the cases cited above there was a detailed review of the record and no dispute of material fact was shown. Where, as here, there are alleged issues of material fact and issues of law, and there is no review of the record provided or of the specific enumerations of error, the denial of Lillian's right to appellate review, O.C.G.A. § 5-6-33, and denial of her constitutional right to a trial by jury is without justification.

Lillian has a right to due process. Constitution of the United States, Amendment 14, Section 1 and 1983 Georgia Constitution, Article I, Section I, Paragraph I. Lillian justifiably relied upon the appellate standards of review as a part of the due process assured to her.

If errors of fact or law that require reversal are ignored because of a procedural rule, due process is denied.

The wrongful refusal by the Georgia Court of Appeals to consider the record is a denial of Lillian's statutory right to appellate review (O.C.G.A. § 5-6-33). That is a denial of the due process protected by the 1983 Georgia Constitution and the Constitution of the United States.

Due process is denied where the trial court fails to follow civil procedures. The trial court granted summary judgment sua sponte on Counts, I, VII, VIII and IX, and did so

without reference to any specific fact or law that would justify such decision.

The trial court and Court of Appeals apparently accepted as part of the record ex-parte hearings for which no record is available. At least James so alleged in his brief in opposition to Lillian's Motion to Set Aside (R # 30, Page 2). James claimed hearings before the trial court on April 2, 1997, and April 7, 1997, to argue Summary Judgment Motions. If held, Lillian was not notified.

Neither the trial court nor Court of Appeals cited any law or Code of Judicial Conduct that authorizes ex-parte hearings, and certainly nothing to establish that ex-parte hearings would be lawful. There is none.

A denial of a limited record authorized by Statute and mandated by the Constitution of the State of Georgia, is denial of a constitutional right, 1983 Georgia Constitution, Article VI, Section IX, Paragraph I.

If violations of constitutional due process and failure to recognize constitutional mandates are permitted in Summary Judgment actions, what justification remains for Summary Judgment to be an exception to the constitutional right to trial by jury?

Lillian's statutory and constitutional rights were denied by the refusal of the Court of Appeals to review the enumerations of error and determine whether issues of law or fact require reversal. An Appeal from the grant of Summary Judgment cannot be denied solely on the basis of less than a complete record.

ARGUMENT AND CITATION OF LAW

I. Errors Of Law And Fact Are Clear On The Record And Compel The Reversal Of The Trial Court Judgment.

Lillian has demonstrated error by the record provided. The Court of Appeals should have reversed the trial court.

For brevity and not as an abandonment of other arguments on the law and facts, this argument will be restricted less than all issues. Trial court errors of fact and law related to Lillian's claims of slander.

Again, the standards of appellate review or error are of long standing and clear.

"If the Court's judgment is based upon a stated fact for which there is no evidence, it should be reversed" (Cites omitted) Lamas v. Baldwin, 140 Ga App 37, 39, 230 SE2nd 213 (1976). And if the judgment rests on "reasons which are erroneous or upon erroneous legal theory, it commits reversible error" (Cites omitted) Ayers v Yancey Brothers Company, 141 Ga App 358, 361, 233 SE2nd 471 (1977). See also Power v Mobley, 170 Ga App 167, 316 SE2nd 580 (1984).

And if, as here, there is an erroneous finding that"may have been instrumental in the courts reaching it's final conclusion the judgment must be reversed" (emphasis added) (Cites omitted) Adamson v Trust Company Bank, 155 Ga App 646, 649, 271 SE2nd 899 (1980).

When, as here, the trial court incorrectly applies the law (i.e. statute of limitations, res judicata) it renders the decision clearly erroneous and "mandates the reversal of the judgment" Scott v Purser Truck Sales, 198 Ga App. 611, 613, 402 SE2nd 354 (1991).

In considering the cause of action for slander, the trial court erred in stating facts for which there is no evidence, misstating facts that may have influenced the decision, and incorrectly applying the law of the statute of limitations that could only be based on errors of fact.

These errors are all demonstrated from the record presented. The record includes: the trial court judgment (R # 27) (Exhibit B, Page 1); the entire complaint as amended (R # 3, 8, 10, 20, 23, 25, and 26); and the December 22, 1993, letter from Maryella Jackson repeating the slander of James (R # 18, Brief, Exhibit B, Attachment 2).

The trial court stated as part of the judgment that "Count III sets forth a cause of action for slander concerning alleged statements "on or before July 11, 1993" (R # 27). See Exhibit "B", Page 1.

Th [sic] trial court was wrong: Lillian's amended complaint (R # 23) states that the suit was for slanderous statements made "on or after June 4, 1993".

The error of fact was obvious, appears on the face of the record provided, and was not harmless. The action was initiated on April 18, 1994 (R # 3). With a one year statute of limitations for slander (O.C.G.A. § 9-3-33), the erroneous fact statement, "on or before July 11, 1993" permitted the trial court to justify and erroneous application of the statute of limitations. The law could not have applied to this action if the court had correctly stated the claims of slander "on or after June 4, 1993".

That was error of fact on the record and led to an error of law.

Further, the Court record includes Defendant's Response to Plaintiff's Response to Defendant's Motion for

Partial Summary Judgment (R # 19). James states that by affidavit Lillian "was complaining of statements made in 1992 and barred by the statute of limitations" (R # 19, Page 2). No citation is given. However, the record does include Lillian's affidavit with attachment 2, Maryella Jackson's letter (R # 18, Exhibit B). The letter is dated December 22, 1993, (within the one year statute) and includes a reference to a slanderous statement by James charging Lillian with abuse requiring Austin (Lillian's husband) to go to an assisted care home.

James's statement to Maryella had to have been made after Austin entered the home on June 4, 1993. Again, it was within the one year statute.

James's Motion for Partial Summary Judgment on slander did not claim any fact that the alleged slanderous statements were made more than one year before the action. The statute of limitations was not raised as an issue (R # 12 and 13). Again the record was provided and was clear.

There being no factual basis for suggesting Lillian was seeking to recover for slanderous actions by James occurring prior to April 18, 1993, the Judgment of the trial court citing the statute of limitations, was based on erroneous facts and those erroneous reasons led to reversible error, Ayers v Yancey Brothers Company, Supra.

The trial court stated that it applied only three legal principles that would deny Lillian's claims (R # 3) (Exhibit "B", Page 5). The erroneous application of the statute of limitations was one, and it appears on the record.

Under the standards of review stated in Lamas v Baldwin, Supra, Adamson v Trust Company Bank, Supra and Scott v Purser Truck Sales, Supra the trial court must be reversed.

The Court of Appeals erred in refusing to review the record for errors appearing in the record.

II. The Application Of The Law Of Res Judicata Was An Error Of Law Appearing On The Record.

Among the three legal principles relied on by the trial court (R # 3) (Exhibit B, Page 5) was res judicata.

The application of res judicata was error.

A Probate Court decision was cited by the Court to be a bar to Lillian's tort action in Superior Court (Exhibit "B", Page 5). The difference in jurisdiction of those two courts makes that application of the law impossible. The limited jurisdiction of the Probate Court, O.C.G.A. § 15-9-30 and O.C.G.A. § 15-9-30.9, would not permit decisions on Lillian's tort claims. And in fact the record of that Probate Court decision shows it did not (R # 14, Exhibit "F").

The record again demonstrates the error of law.

As shown by the Brief of Lillian to the Court of Appeals, errors including but not limited to the errors cited herein, were clear on the record proved.

The errors of fact and law mandate the reversal of the trial court judgment, Scott v Purser Truck Sales, Supra, Page 613.

The Court of Appeals failed to follow applicable authority requiring reversal. That failure calls into questions the legal standards for review of error. It is a question of law, is a matter of importance to the public, Georgia Supreme Court Rule 40, and is subject to review by Writ of Certiorari, 1983 Georgia Constitution, Article VI, Section VI, Paragraph V.

III. The Refusal Of The Court Of Appeals To Consider The Record Submitted In Support Of The Enumeration Of Errors Was Error.

O.C.G.A. § 5-6-40 requires an appellant to provide an enumeration of errors to "set out separately each error relied upon". Appellate courts will not consider an alleged error if that error has not been included in the enumeration of errors, MacDonald v MacDonald, 156 Ga App 565, 275 SE2nd 142 (1980).

And it is the enumerations of error that must be supported by the record, Moye v State, 127 Ga App 338, 193 SE2nd 562. (1972).

If the appellant is limited to arguing only the enumerations of error, then only the record needed to demonstrate those enumerated errors is essential to consideration on appeal. A limited record is appropriate. Jordan v Johnson, 223 Ga App 875, 479 SE2nd 175 (1996).

The refusal of the Court of Appeals to consider a limited record demonstrating error creates uncertainty over the importance and relevance of the enumeration of errors. If the appellant is limited to the issues enumerated, how can a record that is similarly limited be excluded from consideration?

Georgia law is clear. The test is not whether there is an entire record, but whether the limited record provided is adequate to demonstrate error, Jordan v Johnson, Supra.

And when, as here, the trial court says it considered the "entire record" (R # 27) (Exhibit "C", Page 1) but has demonstrably failed to do so (ignoring the content of the amended complaint (R # 23)), how can the Court of Appeals justify relianee upon that statement in denying the appeal?

How can the Court of Appeals use that false statement by the trial court of demand an "entire record" because otherwise the appellant would have "omitted some portion of the evidence upon which the superior court relied" (Exhibit "C", Page 3)? The Court of Appeals reasoned from erroneous facts and the judgment must be reversed. Ayers v Yancey Brothers Company, Supra.

Further, when James discloses unrecorded and/or ex parte hearings that do not appear in the record (See Appellee Brief in response to the motion to set aside, (R # 30, Page 3) how shall the extent of the record be defined?

In Lillian's brief to the Court of Appeals, Lillian cited hearings alleged by James to have been before the court on April 2 and April 7, 1997, to argue the Summary Judgment Motions. If held, Lillian was not notified and any ex parte "hearings" were in violation of due process, 1983 Georgia Constitution, Article I, Section I, Paragraph I. No court has made such records available to Lillian.

So exactly what is the record considered by the trial court?

The reasonable approach to avoid these concerns is to demand only that record needed to demonstrate error. And that is the holding of Jordan v Johnson, Supra and forcefully argued in the concurring opinion of Drummond v Gladson, 219 Ga App 521, 524, 465 SE2nd 687 (1995).

Had the Court of Appeals really been concerned, as it should have been, with the "entire record", and "applicable authority" (R # 27, Page 4) it could have issued a writ of error to the trial court for that "entire record", and specifically any "applicable authority" that would be contrary to O.C.G.A. § 9-

3-33 or allowing ex parte hearings, contrary to due process rights under the Georgia Constitution.

IV. The Court Of Appeals Improperly Created An Exclusionary Rule Compelling The "Entire Record" In Summary Judgment Cases.

Relying upon the series of cases cited in the Court of Appeals decision (Exhibit "C"), the Court of Appeals denied an appeal from the grant of Summary Judgment unless the entire record was submitted.

The Court of Appeals misapplied the holdings of the cases cited.

The cases do not compel or even justify the Court of Appeals to exclude consideration of a limited record. To the contrary, the cases place an affirmative duty on the appellate court to determine whether "the proof necessary for determination of the issues on appeal is omitted".

The appellate court must evaluate the issues on appeal, which means using the enumeration of errors pursuant to O.C.G.A. § 5-6-40. And the court must determine whether the record includes the proof needed to decide the issues on appeal, Brown v Frachiseur, Supra.

In the case at bar the Court of Appeals failed to examine the enumeration of errors or to evaluate the record provided related to those issues. It treated the cases as simply demanding an entire record. Brown v Frachiseur, Supra was improperly used as an exclusionary rule. That is not the holding of the cases. The Court of Appeals had an obligation to examine the enumeration of errors and the record provided. It did not.

It may be argued that since this case dealt with summary judgment an entire record was required by Lawson v Duke Oil Co., 155 Ga App 363, 364, 270 SE2nd 898 (1980), MacKinnon v Hodge, 204 Ga App 539, 420 SE2nd 341. But the holdings there do not require a specific record to be provided; rather they alert appellants to the rule that the appellate court has the authority to consider the entire record in making a decision.

Transport Indem. Co. v Hartford Ins. Co., 198 Ga App 265, 266, 401 SE2nd 520 and related cases as cited confirms the long standing requirement that the appellant "has the burden of showing error affirmatively be the record on appeal".

Further, Transport Indem. Co. v Hartford Ins. Co., Supra, Page 266, recognizes a "presumption" in favor of the trial court judgment if records needed to demonstrate error are omitted. This is based on the long standing rule that an appellant has the burden of showing error affirmatively. While that omission could "generally prove fatal", the trial court must still review the record to make a determination whether error is shown. As noted previously, error has been shown. Transport Indem. Co, v Hartford Ins. Co., Supra, does not create an exclusionary rule. It is not an absolute. It is a presumption. Like all presumptions it can be overcome. If error is clear on the record then the presumption is overcome. The Court of Appeals must review the record.

It was error to preclude consideration of the enumerations of error and record provided and thereby deny Lillian the right to overcome the presumption.

If Lillian has presented issues on appeal (enumeration of errors) and the record provided shows the alleged errors the presumption is overcome.

The Court of Appeals had an obligation under the Constitution of the State of Georgia to evaluate the errors alleged and the record provided. Consideration of a limited record as authorized by statute and constitution is not precluded by cases cited.

Lillian relied upon Jordan v Johnson, Supra and Drummond v Gladson, Supra. Lillian relied upon the statutory framework and the constitution mandate for use of a limited record as outlined in Drummond v Gladson, Supra.

The improper application of the entire record rule as an exclusionary rule to preclude consideration of issues raised and deny evaluation of the record presented was contrary to law, and in conflict with the statutory and constitutional framework. It was clearly prejudicial to the Lillian when the decision disregarded Lillian's justified reliance upon established precedent for a limited record.

Finally the reliance by the Court of Appeals on the trial court statement that it had relied upon the "entire record" was clearly misplaced. The statement was gratuitous window dressing. The record shows that the trial did not consider the entire record including all pleadings. The trial court presented a lengthy judgment including alleged background that was irrelevant to the issues before the court (R # 27, Exhibit B). In all that length there was not one single finding or statement of fact by the court that could be a basis for the application of res judicata to the tort actions before the court on the motion for Summary Judgment. In fact James denied he claimed any application of res judicata to Lillian's tort actions. (R # 30, Page 16, Paragraph 14).

No part of the judgment provided a true fact that could have been a basis for the application of the statute of limitations to the issues of slander. If the trial court says it is making findings of fact, but cites no true or relevant facts to support its legal conclusions what record has the court reviewed? The Court of Appeals had no legal or factual basis to deny consideration of the record provided by Lillian.

The enumeration of errors is due to define the issues in the appeals process (O.C.G.A. § 5-6-40), and thereby create a speedy efficient and inexpensive resolution. That purpose is subverted if the appellant cannot use the required enumeration of errors to structure both the issues and the record needed. It is even more significant in this case where there were multiple motions alleged with separate records, and where the issues were limited to less then all the motions and to only five enumerations of error.

The entire record related to each error enumerated was provided to the Court of Appeals and then made available to the Supreme Court in the Petition for Certiorari. As an example, Lillian had provided the record needed for enumeration of error number one (1), erroneous application of the statute of limitation. The record of applicable pleadings (R #3 23), applicable authority, O.C.G.A. § 9-3-33, and the trial court Order (R # 27) were provided to the Court of Appeals and for her Petition for Certiorari to this Court.

The Court of Appeals improperly converted a presumption to an exclusionary rule.

V. Conclusion.

The record presented was appropriate to establish the error as alleged in each of the five Enumerations of Error.

If a limited record is to be permitted under any circumstances in accord with the constitutional framework, statutory provisions, and cases such as Jordan v Johnson , 233 Ga App 875, 479 SE2nd 175 (1996), then the enumeration of errors must be the means to define those errors and limit that record.

The cases cited by the Court of Appeals confirm that a limited record must be considered to determine if the burden of the appellant has been met. No exclusionary rule was created to prevent consideration of reversible error.

The Court of Appeals had an obligation to examine the issues and evaluate the record, It failed to do so.

The Georgia Court of Appeals has erred in holding that any time a Trial Court recites that it has considered the entire record that the entire record of a multiple count, multiple motion, and multiple issue case must be presented regardless of the limitation of the issues by the enumeration of errors.

If Lillian is denied an evaluation of the record presented there can be no determination by the Court of Appeals whether there are or are not facts in dispute. If facts may be in dispute then Summary Judgment is not longer an exception to the constitutional right to jury trial.

If such an exclusionary rule requiring the entire record without exception is not error, then statutory authorization of a limited record and the constitutional mandate for "speedy, efficient and inexpensive resolution of disputes", 1983 Georgia Constitution, Article VI, Section IX, Paragraph I, are meaningless.

A Georgia Court of Appeals decision that would deny the constitutional right to a jury trial and would make a

constitutional mandate meaningless is clearly a case of "great concern, gravity, and importance to the public", Georgia Supreme Court, Rule 40, and subject to review by Writ of Certiorari, 1983 Georgia Constitution, Article VI, Section VI, Paragraph V.

Lillian respectfully petitions the Georgia Supreme Court to reconsider and grant a Writ of Certiorari, The decision of the Court of Appeals must be reversed, and Lillian must be given her constitutional right to trial before a jury.

Respectfully submitted,

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